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The South African Legal Practice Act: the requirement for University law clinics to have trust accounts: oversight or deliberate barrier?

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1 Introduction

The Legal Practice Act (LPA) appears to have far-reaching implications for legal practitioners at university law clinics.¹ This article will, however, focus only on the compulsory requirement that attorneys at university law clinics should have Fidelity Fund Certificates (FFCs) and therefore open (and presumably operate) separate trust accounts to permit them to practise.² This requirement did not exist in terms of the Attorneys Act.³ This article therefore explores the viability of this new requirement and investigates whether it is essential and complies with the mandate of law clinics. The rationale for establishing university law clinics will be investigated and their activities scrutinised to ascertain whether the requirement is justified. The first part of the article contains the relevant provisions in the LPA and endeavour to explain why this requirement is placed on attorneys at law clinics. Thereafter an examination is conducted to explain why attorneys are required to have trust accounts and attorneys' roles at law clinics. The article then concludes by questioning whether it is reasonable to have a legislative requirement for attorneys employed at university law clinics to have FFCs.

2 The legislative landscape

The LPA was enacted in September 2014 and Section 120 of the LPA which provides that Chapter 10 dealing with the National Forum came into operation in February 2015. Other parts of the act will come into operation on a date to be fixed by proclamation.⁴ Chapter 2, the South African Legal Practice Council, will only come into operation 3 (three) years after Chapter 10 and the rest of the Act will come into operation on a date to be proclaimed after the commencement of Chapter 2. The LPA will repeal statutes such as the Attorneys Act, the Admission of Advocates Act and the Right of Appearance of

¹ The Legal Practice Act (LPA) 28 of 2014. See also McQuoid-Mason "Access to Justice in South Africa: Are there enough lawyers?" 2013 *Oñati Socio-Legal Series* 561.

² See Ss 34(5) (c), 34(8) and 84(8) of the LPA 28 of 2014.

³ Act 53 of 1979. See also Hawkey K, A step closer: Oral hearings on the Legal Practice Bill; submission by: Association of University Legal Aid Institutions (Aulai) *De Rebus* April 2013 36.

⁴ The National Forum was established in February 2015.

Attorneys Act in its entirety.⁵ The fact that not all the provisions of the LPA has come into operation, means that the legal profession is being regulated by different statutes in South Africa. It must be noted that at the time of writing the provisions which require that principal attorneys at law clinics should be in possession of a Fidelity Fund Certificate are not in operation yet.

2.1 The provisions of the Legal Practice Act (LPA)

Section 84(1) of the LPA specifically states that any attorney and any advocate, other than a legal practitioner in the full-time employ of the South African Human Rights Commission (SAHR) or of the state, who practises for his own account, either alone or in partnership, or as a director of a practice that receives or holds money or property belonging to any person, must be in possession of a FFC. Based on the wording of the provision practitioners at university law clinic are not exempted from being in possession of a FFC. The Legislature would after all have had no difficulty in making it explicit that such practitioners are to be exempted from the said requirement.

The above argument is further bolstered by the fact that attorneys, who are employed by Legal Aid South Africa (LASA),⁶ are expressly exempted from obtaining a FFC. It thus stands to reason that section 84(8) of the LPA requires that law clinics must now have FFC's.⁷ Consequently it will be imperative for every attorney, including those attached to law clinics, to have a FFC and to operate a trust account.⁸ The term "legal practitioner" in the LPA is used to include both attorneys and advocates.⁹ The definition of "attorney", in the LPA restricts practitioners to legal practitioners practising with a FFC.¹⁰ This definition in the LPA, effectively excludes all practitioners currently practising at a university law clinic, who are not in possession of a FFC.¹¹ It will also affect law clinic attorneys' eligibility to serve on the Council. In terms of section 7(1) (a) of the LPA, 16 legal practitioners will be members of the Council. It appears that attorneys practising in their current capacities at law clinics will be excluded from serving as Council members. They are to be excluded from the definition of "legal practitioner" and "attorney" in the LPA and will therefore not be represented on the Council. University law clinics will thus not be able to participate in the establishment of the Attorneys Fidelity Fund (AFF) Board¹² by the Council. This could influence the funding of law clinics as they are dependent on financial support from the AFF with which they have had a long-standing relationship and association.

In terms of section 34 of the LPA it is permitted that a law clinic may be established by any university on condition that it is constituted and governed as part of the Faculty of

⁵ See schedule to LPA repealing the Attorneys Act 53 of 1979, the Admission of Advocates Act 74 of 1964 and the Right of Appearance in Courts Act 62 of 1995.

⁶ Section 84(8) of the LPA. The provisions of the section do not apply to legal practitioners who practises in the full-time employment of Legal Aid South Africa on a permanent basis.

⁷ Section 84(8) of the LPA. In footnote 388 of Draft 3 of LPA, the member of Parliament (John Jeffrey) asked the department to clarify the position of non-profit organisations and specifically law clinics. "Mr Jeffery also requested the Department to clarify the position of non-profit juristic entities and law clinics in this regard. For the protection of the public it is suggested that law clinics should also have Fidelity Fund certificates. This approach is already incorporated in this provision. Only LASA is exempted."

⁸ Section 86 of the LPA.

⁹ Section 1 LPA. It is envisaged that both attorney and advocates will be referred to as legal practitioners.

¹⁰ Section 4 read with s 34(2) (b) (i) of the LPA.

¹¹ This means that all the attorneys currently practicing at law clinics at South African universities will be excluded from the definition of attorney, unless the principal attorney open a trust account and apply to be issued with a Fidelity Fund Certificate.

¹² Section 63(1) of the LPA which provides for the establishment of AFF Board.

Law at that university;¹³ that all legal services at the law clinic are rendered by a legal practitioner or under their supervision, which refers to legal services by candidate attorneys and senior law students;¹⁴ that the legal services provided must be accessible to the public;¹⁵ and that the legal services must be rendered free of charge.¹⁶ This requirement that they must render services free of charge, in fact, illustrates that law clinics are not generally required to handle money in the same manner as private practitioners do. An exception is granted to law clinics, in that they may recover amounts that were actually disbursed on behalf of clients.¹⁷ Law clinics are prohibited from performing any work: in connection with the administration or liquidation or distribution of deceased or insolvent estates; for mentally ill persons or for any person under any other legal disability; and regarding the judicial management, business rescue or liquidation of a company.¹⁸ Conveyancing and the lodging of Road Accident Fund claims are likewise prohibited.¹⁹

Although section 34(8) of the LPA provides for the establishment of university law clinics, it does not make provision for attorneys practising there²⁰ and it also does not refer to advocates who practise at university law clinics.²¹ This is a glaring omission in the LPA, which implies that such practitioners must be in possession of a FFC and by implication open and operate a separate trust account. The requirement for trust accounts for lawyers was specifically inserted in the Attorneys Act²² to protect clients against abuse and theft of trusts moneys. The nature of the work undertaken by law clinic negates the risk of abuse of client's trust funds.

3 The rationale for the change

There appears to be no logical and well-reasoned explanation for the new requirement of compulsory FFC's for law clinics. An analysis of the Parliamentary process preceding the promulgation of the Act denotes that there were no significant discussions as to why this departure was proposed or why it is necessary. During parliamentary deliberations the former Deputy Minister of Justice, John Jeffery, questioned whether law clinics should have trust accounts.²³ Unfortunately the question was not afforded due consideration or the debate that it warrants. It was merely confirmed that law clinics should have trust accounts.

By like token Mr Jassiem on behalf of South African University Law Clinics Association (SAULCA)²⁴ made submissions to the justice portfolio committee.²⁵ Jassiem argued that

¹³ Section 34(8) (a) of the LPA.

¹⁴ Section 34(8) (b) of the LPA.

¹⁵ Section 34(8) (c) of the LPA.

¹⁶ Section 34(8) (d) of the LPA.

¹⁷ Section 34(8) (d) of the LPA.

¹⁸ Section 34(8) (e) of the LPA.

¹⁹ Section 34(8) (e) of the LPA.

²⁰ Hawkey K A *De Rebus* April 2013 36.

²¹ Section 34(5) of the LPA where it refers to advocates.

²² Section 78 of the attorneys' act 53 of 1979.

²³ Draft 3 of LPA (footnote 388), the member of Parliament (John Jeffrey) asked the department to clarify the position of non-profit organisations and specifically law clinics. It was suggested that for the protection of the public that law clinics should have Fidelity Fund Certificates.

²⁴ SAULCA is a voluntary association of all South African University Law Clinics, established in approximately 1982, to promote and protect the interests, values and goals of its members.

<http://www.saulca.co.za/>

²⁵ Hawkey K A *De Rebus* April 2013 36.

attorneys at law clinics do not require Fidelity Fund certificates, but the clinics do apply for accreditation to the appropriate law societies. He denoted that the definition of 'attorney' in the Bill, at that stage, was restricted to a legal practitioner practising with a FFC and that this excludes practitioners practising at law clinics or justice centres. It was furthermore submitted by SAULCA that attorneys at law clinics should not require FFC's and that the *status quo*, as at 2012, should remain. A justification for not supporting the legislative change included *inter alia* that law clinics did not charge clients fees for their services.

There is only one exception to the general rule that law clinics do not charge clients for their services; that is when attorneys were successful in litigation and were awarded costs in their favour. In such instances clients usually cede their right to recover legal costs to the law clinic. This is one of the exceptional times when a law clinic will be paid for their services. This is however not a client's money to be kept in trust by the clinic. Hence this exception does not necessitate law clinics to have trust accounts. It was pointed out to the Parliamentary committee that the Bill was silent on this point.²⁶

In a separate written submission made to Parliament, the Witwatersrand University (Wits) law clinic was in favour of this new requirement for their attorneys.²⁷ The reason advanced by the Wits Law Clinic was that their attorneys litigate in the civil courts and are often in receipt of trust monies in the form of damages recovered on behalf of clients and deposits for disbursements. Wits position is contrary to the rest of SAULCA's members.

Their opinion was that such monies should be properly accounted for and subjected to auditing in the normal course in terms of the rules of the various Law Societies.²⁸ While the new requirement is suited to the unique needs of the Wits Law Clinic, due consideration should also have been afforded to the submissions of SAULCA, the official body which represents all law clinics in South Africa. Moreover, given that the legislative change will impact on the operations of all law clinics and significantly so, it may be argued that it should have been preceded by greater consultation with law clinics. This omission in the democratic process will undoubtedly have major implications for access to justice in South Africa and may to some extent defeat or frustrate the mainstay of what some believe to be a functional and improving justice system. The next part of this article discusses the need for attorneys to have trust accounts.

4 Why the stipulation for lawyers to have trust accounts

Prior to the enactment of the LPA only attorneys were required to have trusts accounts.²⁹ Historically the legal profession has always been referred to as a divided profession and split into two branches, namely, advocates and attorneys.³⁰ Although the LPA is aimed at

²⁶ Hawkey K A *De Rebus* April 2013 36.

²⁷ Wits law clinic written submission to justice portfolio committee 2012. <http://www.lssa.org.za/upload/documents/20130606%20-%20Summary%20of%20written%20submissions%20-%20Legal%20Practice%20Bill%20%5BB%20%20-%202012%5D.pdf>.

²⁸ See Wits' submission above.

²⁹ Section 78 of the Attorneys Act 53 of 1979.

³⁰ De Klerk W *Clinical Law in South Africa* (2006) 11. Meintjies van der Walt L *An Introduction to South African law* (2011) 166. Maisel P and Greenbaum *Introduction to Law and Legal Skills* (2001) 67.

Maisel The Education and Licensing of Attorneys and Advocates in South Africa 2010 The Bar

Examiner 15; Meadows "Implementing the Right to Counsel in Post-Apartheid South Africa" 1996:

The George Washington journal of international law and economics (Geo. Wash. J. Int'l L. & Econ) 475; McQuoid-Mason "Access to Justice in South Africa: Are there Enough Lawyers?" 2013 Oñati Socio-Legal Series 561.

consolidating the two professions, legal practitioners will still have a choice to either be an attorney or an advocate.³¹ This article therefore focusses only on trust accounts of attorneys. In order to practise law, an individual must have obtained a law degree.³²

Thereafter, depending on his preference, he must become either an attorney or an advocate.³³ Although law graduates may pursue careers other than in private practice, such as, public prosecutors, state advocates, or state attorneys; seek employment in government departments, such as, the Master's Office or the Deeds Office; or become corporate legal advisors, they are more often than not admitted either as an advocate or an attorney.³⁴

In terms of legislation before the LPA, advocates were not required to have a trust account.³⁵ An attorney's trust account is required by law; any attorney, who wants to commence practising for his own account, must open, in addition to his business banking account, a separate trust banking account.³⁶ It is required that the practitioners should keep their client's money separate from their own. This is aimed at protecting the clients' money.³⁷ The trust account is also the account in respect of which the AFF³⁸ requires an annual audit to determine whether an attorney is to be granted a FFC which he requires in order to practise.³⁹ The purpose of the FFC is to insure against the misuse of client trust funds.⁴⁰ A chartered accountant must undertake an annual trust audit and the report must be submitted to the relevant law society.⁴¹ There are certain advantages for the public: a client, who has been the victim of the theft of his trust funds by an attorney, can claim from the Attorneys Indemnity Insurance Fund (AIIF). The AIIF is a registered short term insurer funded by the Attorneys Fidelity Fund. Its objective is to protect the public by providing professional indemnity insurance to all South African attorneys' practices.

From the abovementioned discussion it ought to be evident that there are sound reasons why attorneys are required to have trust accounts. The requirement provides the law societies to have a quality control mechanism which ensures that attorneys deal properly and honestly with other clients's money.⁴² The annual trust audit required for the issue of a FFC is a barometer that attorneys have complied with.⁴³ Should the auditor submit a qualified report or note any discrepancy in the operation of the trust account, the relevant law society will conduct an investigation, and if not satisfied with the practitioner's

³¹ Sections 1, 24 and 30 LPA propose a new type of practitioner, who can choose to practice as an Attorney or as an advocate and who has a trust account.

³² Section 15 Attorneys Act 53 of 1979. De Klerk (2006) 13. McQuoid-Mason 2013 Oñati Socio-Legal Series 565.

³³ Meintjies Van der Walt (2011)166.

³⁴ De Klerk (2006)13.

³⁵ Admission of Advocates Act. Section 1, 24 and 30 the definition of legal practitioner in the LPA.

³⁶ Section 78 of the Attorneys Act 53 of 1979. Palmer & Crocker "The payment of trust-account interest: The ethical duties of attorneys towards their clients, and the implications of the new Legal Practice Act" 2012 *Obiter* 345.

³⁷ Palmer & Crocker *Obiter* 345. *Law Society Transvaal v Mathews* 1989 (2) SA. Hoffman Lewis & Kyrrou's Handy Hints on Legal Practice (1997) 136. Lewis Legal Ethics: A Guide to Professional Conduct for South African Attorneys (1982) 269.

³⁸ Section 25 of the Attorneys Act 53 of 1979.

³⁹ See ss 41 and 42 of the Attorneys Act 53 of 1979. Hamman & Koen "Cave Pecuniam: Lawyers as Launderers" 2012 *PELJ* 69. Maisel 2010; The Bar Examiner 21.

⁴⁰ Maisel 2010 The Bar Examiner 21.

⁴¹ Hamman & Koen 2012 *PELJ* 69. The various law societies have rules which require their members to undergo an annual audit in order to apply for a Fidelity Fund Certificate. See, for example, Rule 13 of the Rules of the Cape Law Society and Rule 70 of the Rules of the Law Society of the Northern Provinces.

⁴² Hamman & Koen 2012 *PELJ* 69. *Hirschowitz Flionis v Bartlett and Another* 2006 (3) SA 575 (SCA) para 30.

⁴³ Sections 41 & 42 of the Attorney's Act 53 of 1979.

explanation, he may face disciplinary action or even be interdicted from practising.⁴⁴

There are many good reasons why it is necessary to have proper controls and mechanisms in place to avoid the abuse of trust funds. Some attorneys' practices manage substantial amounts of their clients' money on a daily basis.⁴⁵ Attorneys perform a variety of services, such as, the incorporation of legal entities, instituting claims against the Road Accident Fund, and dealing with conveyancing matters.⁴⁶ The private practice of an attorney is mostly fee driven and fees are primarily provided for in payment of the professional services that the attorney renders. Attorneys must also generate sufficient fees to cover overhead expenses, such as, rental, telephone, salaries and wages, and must have an office infrastructure with the latest technology in computer equipment as well as internet facilities.⁴⁷ They therefore have to charge their clients fees for professional services rendered, in order to sustain themselves and to cover their expenses.

When operating a trust banking account, attorneys deal with other people's money, which should be kept separate from their business and private accounts. The interest earned by attorneys on the money in their trust accounts must be paid over to the AFF.⁴⁸ In the event of the misappropriation of a client's funds, a claim for compensation can be submitted to the Attorneys Insurance Indemnity Fund (AIIF).⁴⁹ The next part discusses whether university law clinics render the type of services which can be equated to private practitioners. This section will in all likelihood assist in bolstering the argument that principal attorneys at law clinics should not be required to have FFC and trust accounts.

5 University law clinics

According to SAULCA there are presently 17 South African law faculties that have university based law clinics.⁵⁰ Many universities do not fund the access to justice component in law clinics and have to source funding, *inter alia* from external donors.⁵¹ However, certain universities are responsible for the salaries of some clinic staff; provide

⁴⁴ *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T). *Holmes v Law Society of the Cape of Good Hope and Another* 2006 (2) SA 139 (C). *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 SA. *The Law Society of the Cape of Good Hope v Peter* [2006] SCA 37.

⁴⁵ Hamman & Koen 2012 *PELJ* 81.

⁴⁶ Hamman & Koen 2012 *PELJ* 81. In terms of Section 34(8)(e) of LPA attorneys at law clinics are prohibited to perform this type of work.

⁴⁷ See Bodenstein "Access to Legal Aid in Rural South Africa in seeking a coordinated approach" 2005 *Obiter* 304. Universities provide this for law clinics.

⁴⁸ Section 78(2)(a) of the Attorneys Act 53 of 1979 Practitioners may invests clients' money in trust which is not immediately required. This type of account will generate a higher interest to be paid over to the Attorneys Fidelity Fund. S 78(2A) of Act 53 of 1979 regulates the position where money is invested in on the written instructions of the client and the interest accrues to the specific client.

Palmer & Crocker *Obiter* 346. Hamman & Koen 2012 *PELJ* 82.

⁴⁹ See www.aiif.co.za <http://www.aiif.co.za/claims-procedure>

⁵⁰ McQuoid Mason "Access to Justice in South Africa" 1999 *Windsor Yearbook of Access of Justice* 247.

McQuoid Mason 2013 *Oñati Socio-Legal Series* 570. The universities are: University of South Africa, Witwatersrand Law Clinic, Johannesburg Law Clinic, Pretoria Law Clinic, Free State Law Clinic, Rhodes Law Clinic, Fort Hare Legal Aid Clinic, Walters Sisulu Law Clinic, Nelson Mandela University Law Clinic, Fort Hare Law Clinic, UKZN Howard College Law Clinic, , UKZN Pietermaritzburg Law Clinic, Limpopo Law Clinic, Venda Law Clinic, University of Potchefstroom Law Clinic (CCLD), University of Potchefstroom Mafikeng Campus Law Clinic, University Western Cape Law Clinic, University of Cape Town Law Clinic, University Stellenbosch Law Clinic. For further information see <http://www.aulai.org.za>. Before the University mergers there were 21 University based law clinics. Mhlungu 2004 *Georgia State University Law Review* 1022.

⁵¹ Bodenstein 2005 *Obiter* 316, McQuoid Mason 2013 *Oñati Socio-Legal Series* 570. Funding from Aulai trust are sourced from the Ford foundation, grants from attorneys Fidelity of Fund of the Law Society of South Africa. Some universities are responsible for the salaries of some clinic staff, universities provide free or highly subsidised office accommodation, furniture, copying, telephone fax facilities and student assistants.

free or highly subsidised office accommodation, furniture, copying, telephone and fax facilities as well as student assistants, in order to alleviate the financial burden of their clinics.⁵² Generally clinics do not charge clients a fee and at most require them to cover some of the disbursements. The LPA requires that law clinics provide free services to clients. This requirement appears to contradict or obviate the need for FFC'S and trust accounts for law clinics.

The operations of law clinics and the financial dynamics they face are such that it might be wholly inappropriate and impractical for them to comply with the requirement of having FFC and trust accounts. Law clinics must increasingly justify their expense and need for funding, as funding has become a major issue as donors over the years became more stringent as regards their funding requirements. Law clinics are now also competing for funding with other public interest law firms.

Law clinics receive funds also from their respective Law Faculties, grants by international donors, SAULCA, and the AFF.⁵³ In addition, with the restructuring of LASA and the increase in its resources and capacity to provide legal services to the poor and marginalised, it became important for law clinics to redefine their role in providing access to justice in view of these challenges.⁵⁴ Law clinics have also acquired more specialised areas of expertise which concentrate on the needs of vulnerable groups such as women, children, people living with HIV/AIDS, the landless, farm workers, refugees, etc.⁵⁵ They established specialist legal units, which enable them to receive funding from international as well as national donors.⁵⁶ Law clinics operate either from premises provided by the university or from satellite offices in nearby communities. Some of them will have no overhead expenses, such as, rental, telephones and other incidental expenses, which are either covered in full or in part by the universities.⁵⁷ It could be that in some instance certain law clinics will have certain overhead expenses for which they will be liable, but not to the extent as that of an independent law firm. The financial controls required for private practices should therefore not be the same for law clinics.

Attorneys and advocates at law clinics perform various functions related to the law clinics' purposes: assisting the indigent, providing opportunities to candidates to enter the legal profession and training of senior law students.⁵⁸ Although these three functions are interrelated and indeed overlap in certain instances, they will be discussed separately.

6 Clinical legal education

One of the mandates of law clinics is to provide clinical legal education to especially final year law students.⁵⁹ The fact that the indigent are also provided with legal services is a corollary of the training of students. Law clinics incorporate a clinical methodology whereby students learn through doing and the focus is mainly on civil litigation.⁶⁰ The

⁵² Bodenstein 2005 *Obiter* 316.

⁵³ Bodenstein 2005 *Obiter* 316.

⁵⁴ Bodenstein 2005 *Obiter* 312.

⁵⁵ Bodenstein 2005 *Obiter* 312.

⁵⁶ Bodenstein 2005 *Obiter* 316.

⁵⁷ Bodenstein 2005 *Obiter* 316.

⁵⁸ Mhlungu "Educating and Licensing Attorneys in South Africa" 2004 Georgia State University Law Review 1005.

⁵⁹ Du Plessis M A Clinical Legal Education : Identifying Pedagogical Components 2015 *Journal for Juridical Science* 40(2) 66.

⁶⁰ McQuoid Mason 2013 *Oñati Socio-Legal Series* 570.

students are usually senior or final year law students who work at law clinics for academic credit.⁶¹ It may be either on a voluntary or compulsory basis. Students consult with actual clients, take statements, open files, assist with the drafting of legal documents and pleadings, research points of law, and attend court appearances as observers.⁶² It gives them excellent exposure to many practical techniques,⁶³ such as, interviewing clients,⁶⁴ discussing clients' statements with them,⁶⁵ and preparing possible questions that might be asked during a trial.⁶⁶ All of this is done in a controlled environment and under the close supervision and mentoring of qualified attorneys at the law clinics.⁶⁷

Part of the final assessment of senior law students at some institutions is the compulsory participation in mock trials. Participants are divided into groups to act on behalf of "defendants" and "plaintiffs" or they act as "prosecutors" and representatives of "the accused" in criminal "trials".⁶⁸ Their theoretical understanding of subjects, such as, the law of evidence, the law of criminal procedure and the law of civil procedure, is given a practical dimension when they must consult with and prepare witnesses for trial, lead witnesses in evidence in chief or cross-examine or re-examine them. It also allows them to apply their knowledge of substantive law to real situations. They acquire some skill in analysing the facts of a case and marshalling arguments when submitting closing arguments and arguments during mitigation of sentence. Their drafting skills are also being honed in that they are required to draft heads of argument. They also get the confidence to speak in front of the adjudicators, such as, practising attorneys, advocates, magistrates and judges.⁶⁹ It provides them with invaluable experience and also demystifies the fear of practice and the court

This function of a law clinic, although it replicates of what may be expected in private practice, never involves situations where a student will have to work with funds. "Billing" clients is not part of their training, hence opening of trust accounts are futile. This is a reality and should have been considered during parliamentary deliberations.

6.1 Assisting the indigent

Although the mandate of law clinics includes the training of law students, they also provide free legal services and access to justice to the poor and marginalised communities in urban and rural areas.⁷⁰ Certain law clinics not only provide free legal services on its campus, but have established satellite offices to accommodate the residents of the poorer, more populous areas.⁷¹ In fulfilling their primary aim to train students in the practical application of the law,⁷² legal aid is provided to the surrounding poor communities.⁷³

⁶¹ This course is compulsory at Wits law clinic. McQuoid Mason 2013 *Oñati Socio-Legal Series* 570. Bodenstein 2005 *Obiter* 312.

⁶² Meadows 1996: *Geo. Wash. J. Int'l L. & Econ* 491. McQuoid Mason 2013 *Oñati Socio-Legal Series* 570. Bodenstein 2005:310).

⁶³ Mhlungu 2004 *Georgia State University Law Review* 1024.

⁶⁴ Marnewick *Litigation Skills for South African Lawyers* (2007) 3.

⁶⁵ Amsterdam 1984 *Journal of Legal Education* 616.

⁶⁶ Amsterdam 1984 *Journal of Legal Education* 617. Marnewick (2007) 237.

⁶⁷ McQuoid Mason 1999 *Windsor Yearbook of Access of Justice* 247. Meadows 1996: *Geo. Wash. J. Int'l L. & Econ* 491. Bodenstein 2005 *Obiter* 312.

⁶⁸ Amsterdam 1984 *Journal of Legal Education*: 616. Maisel 2010 *The Bar Examiner* 16. Barrat et al *Skills for Law Students: Fresh Perspectives* (2008) 277.

⁶⁹ Du Plessis 2015 *Journal for Juridical Science* 40(2) 66.

⁷⁰ McQuoid Mason 1999 *Windsor Yearbook of Access of Justice* 247. Meadows 1996: *Geo. Wash. J. Int'l L. & Econ* 491. Bodenstein 2005 *Obiter* 312.

⁷¹ Amsterdam "Clinical Legal Education a 21st Century Perspective" 1984 *Journal of Legal Education* 500.

⁷² Bodenstein 2005 *Obiter* 318. See also (n3 above) *De Rebus* April 2013 36.

The clinics deal with a variety of matters to assist the indigent. Law clinics do, however, not provide services such as conveyancing, third-party claims, and personal-injury claims.⁷⁴ Indigent clients seeking legal assistance make an appointment and are interviewed either by the law clinic students under the direct supervision of a qualified attorney or by a professional staff member. In order for clients to qualify for legal assistance, they generally satisfy a means test.⁷⁵

The historical motivation for the establishment of law clinics reinforces the argument that the requirement for attorneys to have trust accounts does not resonate with the historical and contemporary mandate of law clinics. In 1986 the law clinics formed the AULAI, now called SAULCA.⁷⁶ Law clinics were established in South Africa at the various universities during the 1970s and the 1980s.⁷⁷ The establishment of these clinics was a response to the need for legal services for the marginalised and indigent.⁷⁸ Many clinics operated in places where there was a need for legal representation as state legal aid was absent. In the early 1990s various clinics obtained formal law clinic accreditation and this allowed them to employ candidate attorneys, often drawn from the ranks of the previously disadvantaged. The issue of providing articles of clerkship to candidate attorneys will be further discussed below.

6.2 Providing articles for candidate attorneys

Prior to the 1993 amendment of the Attorneys Act prospective non-white lawyers, in particular, faced overwhelmingly complex barriers to admission to legal practice.⁷⁹ They encountered many difficulties to find articles of clerkship in an otherwise white dominated profession. One of the innovative proposals at that stage was to expand the access of non-whites to both legal representation and the legal profession involved the expansion of law school clinical programs.⁸⁰ The Attorneys Amendment Act of 1993 allowed prospective attorneys to fulfil their articles of clerkship requirement by performing community service at a university law clinic.⁸¹ In terms of the amendment a candidate attorney is allowed to serve under a contract of service in a law clinic for two years in order to be exempted from serving articles of clerkship with a principal in private practice.⁸² The provision that an attorney shall at no time have more than three candidate attorneys under articles of clerkship does not apply to principals who engage candidate

⁷³ McQuoid Mason 1999 *Windsor Yearbook of Access of Justice* 247, Bodenstein 2005 *Obiter* 312.

⁷⁴ Section 34(8) of the LPA specifically excludes law clinics from performing this type of work.

⁷⁵ Legal Aid South Africa: Legal Aid Guide (2012) 157. The law clinics in South Africa apply the means test laid down by the Legal Aid Board South Africa which is revised from time to time.

⁷⁶ Bodenstein 2005 *Obiter* 310. McQuoid Mason 2013 *Oñati Socio-Legal Series* 570. The Law Clinics formed an association called South African Universities Law clinics association (SAULCA), previously called the Association of Legal Aid Institutions (AULAI), to promote the interests of Law clinics in South Africa. See www.aulai.org.za and www.saulca.co.za.

⁷⁷ The first South African University legal aid clinic was established in September 1971 at the University of Cape Town. At the University of Witwatersrand an "off-campus" clinic was set up at the beginning of 1973. Clinics were started at the University of Natal in Durban in 1973 and in Pietermaritzburg in 1974. This was followed by Port Elizabeth (1974), Stellenbosch and Western Cape (1975), Durban Westville and Zululand (1978), Rhodes (1979) and Pretoria (1980) and the remaining universities all founded clinics in the 80's.

⁷⁸ Bodenstein 2005 *Obiter* 318.

⁷⁹ Meadows 1996: *Geo. Wash. J. Int'l L. & Econ* 454.

⁸⁰ Bodenstein 2005 *Obiter* 312, Meadows 1996: *Geo. Wash. J. Int'l L. & Econ* 454.

⁸¹ "Community service" is defined under the Act as service at a law clinic, a legal-aid centre controlled by a non-profit agency, or a legal-aid clinic controlled by the Legal Aid Board, such as a public-defender office". "Law clinic" is defined as "a centre for the practical legal education of students located at a law school in the Republic", Meadows 1996: *Geo. Wash. J. Int'l L. & Econ* 454, McQuoid Mason 1999 *Windsor Yearbook of Access of Justice* 241, Bodenstein 2005 *Obiter* 312.

⁸² Act 115 of 1993, McQuoid Mason 1999 *Windsor Yearbook of Access of Justice* 241.

attorneys under contracts of community service.⁸³ The amendment also allows candidate attorneys to attend a four to six months practical training course approved by the Law Society in the province where they are registered.⁸⁴ Upon completion of the course to the satisfaction of the Law Society, the candidate can serve either one year under articles of clerkship or perform one year of community service under an approved contract of service.⁸⁵

According to SAULCA there were in 2013 approximately 72 attorneys and 72 candidate attorneys employed at law clinics in South Africa.⁸⁶ Law clinics, are, together with the Legal Aid Board of South Africa, one of the major providers of legal aid and civil and human rights assistance in the country. Law clinics employ advocates, attorneys, candidate attorneys and in some instances paralegals. In 2007 SAULCA entered into an agreement with the Department of Justice and Constitutional Development to provide 100 candidate attorneys with the opportunity to do community service; this number was increased in 2009 to 150.⁸⁷ Law graduates who would otherwise have been employed were thus enabled to serve their period of articles of clerkship at a law clinic.⁸⁸ Because of their attachment to educational institutions, law clinic attorneys are not only actively involved in the practical legal training of law students, but also fulfil a mentoring role for candidate attorneys.⁸⁹ Candidate attorneys, on the other hand, also have an opportunity to mentor law students and assist them with their clinical legal training.⁹⁰ It is thus clear that university law clinics are not focused on generating fees. Law clinics have an apparent dual objective; namely, (1) provide clinical legal education and (2) to provide legal assistance to the poor.

7 Should attorneys at law clinics have trust accounts?

In summation there are cogent arguments against the requirement of FFC and trust accounts for attorneys at law clinics. In the ordinary course of operations at law clinics attorneys mainly render legal services to the indigent and offer clinical legal education to students.⁹¹ Conceivably it is possible that on very rare occasions such attorneys may, if they act in civil matters and in High Court litigation, work with substantial amounts of money.⁹² Additionally, if a law clinic is successful in a civil matter and receives a cost award in their favour, then such cost will be allocated to the coffers of the law clinic. Attorneys at the law clinic would therefore not need a trust account for such funds as it belongs to the clinic and not their client.

Attorneys at law clinics are not burdened by the financial commitments which private practitioners must meet. As mentioned earlier attorneys at law clinics do not have to sustain the clinic financially. They can be described as law teachers, who practice only for

⁸³ Section 3(3) of the Attorneys Act 53 of 1979. See also *Ex parte Natal Law Society* 1995 (2) SA 946 (N).

⁸⁴ Section 1 of Act 115 of 1993.

⁸⁵ Section 1 of Act 115 of 1993.

⁸⁶ See <http://www.saulca.co.za/statistics>.

⁸⁷ Hawkey K A April 2013 *De Rebus* 36.

⁸⁸ Meadows 1996: *Geo. Wash. J. Int'l L. & Econ* 491. At one stage when there was an agreement between the Department of Justice and law clinics, there were up to 10 articulated clerks who did their contract of community service at the law clinics in terms of the agreement.

⁸⁹ Meadows 1996: *Geo. Wash. J. Int'l L. & Econ* 491.

⁹⁰ Meadows 1996: *Geo. Wash. J. Int'l L. & Econ* 491.

⁹¹ Meadows 1996: *Geo. Wash. J. Int'l L. & Econ* 475, Bodenstein 2005 *Obiter* 318.

⁹² Wits in their submission states that they institute civil claims on behalf of clients.

the benefit of the indigent.

The Legislature should have considered that the sole purpose of requiring attorneys to have FCCs is to protect clients who are duped by dishonest practitioners: Such clients can submit their claims to the AIIF for relief. Whilst there might be ways in which attorneys at law clinics may be able to manifest dishonest behaviour, the nature of the work and the practices of law clinics are such that stealing money from a client is virtually impossible.

The protection of the AIIF is therefore not applicable to clients of law clinics. To require law clinic attorneys to have trust accounts will at best place an unnecessary burden on them and at worst not serve the real interests of the majority of clients.

Apart from the burden to attorneys there are a number of difficulties that will arise out of such a requirement. The challenges include: deciding in whose name a trust account should be opened; should all the attorneys at the clinic have trust accounts or only the principal? This begs the question of whether the new legislative requirement will be opening up the possibility that clinics will be unable to deliver services for which they were traditionally established. This change might undermine the original mandate of law clinics and impact negatively on the training that they are supposed to offer to final year law students and candidate attorneys. It is suggested if a law clinic such as Wits wants to apply for a FCC and a trust account, they should be allowed to do so. This however should not be a requirement imposed on all the law clinics.

8. Conclusion

It is submitted that the requirement in the LPA that attorneys based at university law clinics must be in possession of a FCC is not reasonable and justified. It is recommended that the legislature should give serious consideration to excluding this requirement from the LPA. If not, this part of the Act could lead to burdening law clinics attorneys unnecessarily by compelling them to have trust accounts. The reason why this particular matter did not receive much attention could be that the focus of the profession centre too much on the independence of the profession and attempting to minimise government's influence in the organised profession. Unfortunately the matter of trust accounts for law clinics was not debated in any significant detail and the role players such as the law clinics were not consulted. This is a serious flaw in the democratic process.

The South African legal profession is facing complex challenges⁹³ and law clinics provide a crucial service to address the imbalances of the past. Impediments should not be placed in their way by requiring attorneys at university law clinics to have trust accounts.⁹⁴ It is recommended that the definition of "attorney" in the LPA should be amended to read: "Either a legal practitioner practising with a FCC or an attorney practicing at a law clinic or justice centre without a FCC."⁹⁵

It is further suggested that section 84(8) should be amended to read as follows: "The provisions of this section do not apply to an Attorney who practises in the full time

⁹³ Meadows 1996: *Geo. Wash. J. Int'l L. & Econ* 502.

⁹⁴ Hawkey K A April 2013 *De Rebus* 36.

⁹⁵ Hawkey K A April 2013 *De Rebus* 36.

employ of Legal Aid South Africa or of a law clinic of a university.”⁹⁶

⁹⁶ Hawkey K A April 2013 *De Rebus* 36.